STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 15, 2007
v	No. 266809 Oakland Circuit Court
STANLEY EARL DAVIS, Defendant-Appellant.	LC No. 2005-202766-FH

Before: Servitto, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of felonious assault, MCL 750.82. He was sentenced as a third habitual offender MCL 769.11, to two to eight years' imprisonment. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

At trial, the victim testified that on January 27, 2005, defendant, her ex-boyfriend, hit her in the face with a brick. She described it alternatively as a "grayish rock or brick" and "a blunt object" and testified that it was definitely not a fist that hit her. The teeth in her partial plate were broken and her lip and eyebrow were cut as a result of the impact, necessitating medical treatment. The parties stipulated to the entry of the victim's medical records at trial.

Defendant requested a jury instruction on aggravated assault, MCL 750.81a, or assault and battery, MCL 750.81. The trial court found there was no issue as to whether a weapon was used and refused defendant's request, ruling: "On this record and on the case law the Court agrees that it's necessarily lesser included, but that the requirements have met that it is–that the lesser must have all of the elements of the higher and not be in dispute. And this Court believes that under those–under that framework that the instructions for A and B should not be read on this record."

Defendant argues on appeal that the trial court erred in refusing to instruct the jury on a lesser offense and that his conviction should be reversed. We disagree.

This Court reviews an issue of instructional error de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002). "[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). Necessarily lesser

included offenses are those that can be proven by the same facts that are used to prove the greater offense. *Cornell, supra*, 354, quoting *People v Torres (On Remand)*, 222 Mich App 411, 419-420; 564 NW2d 149 (1997); MCL 768.32. Cognate lesser offenses are those that are merely in the same class or category at the greater offense. *Cornell, supra,* 345, quoting *People v Jones*, 395 Mich 379, 387; 236 NW2d 461 (1975).

The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996); MCL 750.82. A battery is not a required element, as it is in a charge of assault and battery. See *People v Acosta*, 143 Mich App 95, 101; 371 NW2d 484 (1985); MCL 750.81. An actual injury is not a required element, as it is in the charge of aggravated assault. *People v Brown*, 97 Mich App 606, 610, 614; 296 NW2d 121 (1980); MCL 750.81a. Therefore, neither of the lesser charges, as requested by defendant, are necessarily included lesser offenses under *Cornell*, *supra.*

Furthermore, the *Cornell* Court held that not only must the requested offense be a necessarily included lesser offense, but also that a rational view of the evidence must support the request. Id. at 357. Defendant essentially argues that, because the victim described the weapon in various ways and because she told the police that defendant either hit her directly or threw the object at her, the jury should have been instructed on one of the requested misdemeanor offenses. However, as the trial court found, no evidence was presented at trial from which the jury could conclude that defendant assaulted the victim with anything other than a weapon (i.e., a brick or stone). Thus, the trial court did not err in refusing to instruct the jury on the requested misdemeanor offenses given their nature as cognate lesser offenses that were not supported by the evidence.

Affirmed.

/s/ Deborah A. Servitto
/s/ Michael J. Talbot
/s/ Bill Schuette